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12

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION

16
17 TEVRA BRANDS, LLC,

Case No. 3:19-cv-04312-BLF

18 v.
Plaintiff,

19 v.
20 BAYER HEALTHCARE LLC, and
BAYER ANIMAL HEALTH GmbH, and
BAYER AG,

**PLAINTIFF TEVRA BRANDS, LLC'S
SUR-REPLY IN OPPOSITION TO
DEFENDANTS BAYER HEALTHCARE
LLC'S MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM**

21
22 Defendants.

Date: February 27, 2020
Time: 9:00 a.m.
Ctrm: 3, 5th Floor
Judge: Honorable Beth Labson Freeman

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24

25
26 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**

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1 Bayer's fourteen purported agreements with retailers and distributors (Exhibits 1–14 to
 2 Bayer's Request for Judicial Notice, ECF No. 43 ("RJN")) (collectively, the "New Exhibits") are
 3 not incorporated into the Complaint, nor subject to judicial notice. Even if they were, the New
 4 Exhibits support Tevra's allegations of tying and exclusive dealing, because [REDACTED]

5 [REDACTED]
 6 [REDACTED]

7 [REDACTED] These contract terms, along with Bayer's
 8 extensive rebate programs, make the contracts *de facto* exclusive dealing agreements. Their
 9 practical effect is to require retailers to exclusively purchase and promote Bayer's imidacloprid
 10 products if they want to buy Seresto. Because "Seresto is a 'must have' product for Pet Specialty
 11 Retailers and Online Retailers" (Compl. ¶ 73), the New Exhibits show why retailers cannot
 12 easily terminate their Bayer contracts. Bayer's Motion to Dismiss should be denied.

13 **A. The New Exhibits support Tevra's tying and exclusive dealing claims.**

14 The New Exhibits contain [REDACTED] For example, the [REDACTED]

15 [REDACTED]
 16 [REDACTED]

17 [REDACTED] RJN Ex. 3 at BAH 67, 70. [REDACTED]

18 [REDACTED]

19 [REDACTED] *Id.* at BAH 64, 67. RJN Exhibits 2 & 4–9 [REDACTED]

20 The New Exhibits also show how Bayer's rebates force retailers to buy Bayer's
 21 imidacloprid exclusively. [REDACTED]

22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

26 [REDACTED] RJN Ex. 3 at BAH 67–68. These conditions convinced retailers they
 27 cannot buy imidacloprid from anyone else because they cannot afford to lose the Seresto rebates.

1 **B. The New Exhibits show that Bayer's agreements are not easily terminable.**

2 Bayer claims the New Exhibits show its agreements are easily terminable, so they cannot
 3 foreclose substantial competition. This assumes the simple insertion of a termination clause into
 4 a tying and exclusive dealing agreement prevents any substantial lessening of competition. This
 5 assumption is unfounded. The Court must evaluate the economic impact of the entire contract,
 6 not just a single term. The Complaint alleges that the economic impact of Bayer's contracts is
 7 that no pet specialty retailer will terminate its Bayer contract to switch to Tevra's product.

8 The New Exhibits show one reason why not: [REDACTED]

9 [REDACTED] a must-have product for pet specialty retailers.

10 Compl. ¶¶ 4, 73. [REDACTED]

11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED] But even if (contrary to the Complaint's
 14 allegations) Bayer were willing to sell Seresto at the regular wholesale price to a retailer whose
 15 contract was terminated, the discounts lost would make it unprofitable to the retailer. Compl. ¶
 16 128. For example, discounts in [REDACTED] contract (Ex. 3) include, but are not limited to:

Discount & Percentage	Requirements
[REDACTED]	[REDACTED]

25 [REDACTED]
 26 [REDACTED] *Id.* at BAH 60. [REDACTED]

27 [REDACTED] *Id.* Applying the potential

1 [REDACTED] discount to the [REDACTED] would lose [REDACTED] in discounts
2 if it terminated its tying and exclusive dealing agreement with Bayer.

3 Prior versions of the [REDACTED] agreement contain additional anti-competitive provisions
4 that [REDACTED]

5 [REDACTED] RJD Ex. 2 at BAH 49 ¶
6 4.b. [REDACTED]

7 [REDACTED] *Id.* at BAH 49 ¶ 6. Additionally, around the same time
8 manufacturers of generic imidacloprid attempted to enter the market, [REDACTED]
9 [REDACTED] (*Id.* at BAH 55 ¶ 5), [REDACTED] e
10 [REDACTED] *Compare id.* at BAH 55 ¶ 5 with RJD Ex. 3 at BAH 68 ¶ 5.

11 Bayer's other agreements contain similar anti-competitive provisions. For example, the
12 agreements with [REDACTED]
13 [REDACTED]
14 [REDACTED] RJD Ex. 4 at BAH 80–81; Ex. 5 at BAH 92–93; Ex. 6
15 at BAH 103–05; Ex. 7 at BAH 115–16; Ex. 12 at BAH 229–34. [REDACTED]
16 [REDACTED]

17 [REDACTED] RJD Ex. 11 at BAH
18 175–80. Accordingly, the New Exhibits support Tevra's allegation that Bayer's discounts
19 effectively preclude retailers from buying generic imidacloprid, as retailers risk losing millions
20 of dollars in discounts from Bayer if they do business with Bayer's competitors. Compl. ¶ 125.

21 For the reasons stated here and in its Response and prior briefs, Tevra respectfully
22 requests the Court not consider Bayer's New Exhibits at all, much less for the truth of the matters
23 asserted therein. ECF No. 35 at 1–3, 16 & ECF No. 46. However, if the Court does consider
24 them, they strongly support the Complaint's allegations. Bayer's Motion should be denied.

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1 Dated: January 17, 2020

Respectfully Submitted,

2 POLSINELLI LLP

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4 By: /s/ Alexa R. DiCunzolo
Alexa R. DiCunzolo

5 Attorneys for Plaintiff
6 TEVRA BRANDS, LLC

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